

SERVICE DATE – DECEMBER 24, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35863

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION—ACQUISITION  
EXEMPTION—CERTAIN ASSETS OF PAN AM SOUTHERN LLC

Digest:<sup>1</sup> The Massachusetts Department of Transportation does not need Board authorization to acquire certain assets of Pan Am Southern LLC. Pan Am Southern will retain the legal obligation to provide freight rail service, and MassDOT will not be able to interfere unreasonably with that service. MassDOT does require Board authorization to acquire any passenger rights from Pan Am Southern.

Decided: December 23, 2014

The Board is granting in part and denying in part the motion filed by the Massachusetts Department of Transportation (MassDOT) to dismiss its notice of exemption filed in this proceeding to acquire physical assets and passenger rights currently belonging to Pan Am Southern LLC (PAS). While we find that 49 U.S.C. § 10901 does not apply to the sale of the physical assets, it would apply to the sale of any rights that PAS might currently possess to operate passenger trains between Springfield, Mass., and the Massachusetts-Connecticut border.

BACKGROUND

PAS is a freight common carrier that possesses rights to operate approximately 437 miles of track (collectively, the “PAS Lines”) in New England. The PAS Lines consist of 238.3 miles of PAS-owned rail lines and 198.4 miles of track over which PAS possesses trackage rights. MassDOT is a noncarrier instrumentality of the Commonwealth of Massachusetts (the Commonwealth).

On October 10, 2014, MassDOT filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from PAS certain railroad assets and associated rail line right-of-way, known generally as a portion of the Connecticut River Main Line (also known as the “Knowledge Corridor”), approximately 49.67 route miles in length, from Station 2+25 in Springfield, Mass., to the Massachusetts-Vermont border at Station 2613+66.85 at East Northfield, Mass. MassDOT states that it would also acquire any right, title, or interest that PAS might currently possess to operate passenger trains between Springfield and the Massachusetts-

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Connecticut border. Simultaneously, MassDOT filed a motion to dismiss the notice, asserting that the transaction does not require Board authorization because MassDOT would not become a common carrier as a result of the transaction.

Notice of the exemption was served and published in the Federal Register on October 24, 2014 (79 Fed. Reg. 63,668). On November 6, 2014, the Board received comments from the Brotherhood of Railroad Signalmen and the Brotherhood of Maintenance of Way Employees Division/IBT (collectively, the Unions) in response to MassDOT's motion to dismiss. Although the Unions state that they continue to oppose the "State of Maine" doctrine that MassDOT relies on in its motion to dismiss, they do not oppose the transaction here because PAS would continue to be responsible for maintenance of way, signal, and dispatch work for the line being conveyed.

## DISCUSSION AND CONCLUSIONS

MassDOT's motion to dismiss raises two issues. The first is whether our regulatory approval is required for MassDOT to acquire the track, right-of-way, and other physical assets described above, where PAS would retain a permanent, exclusive easement to conduct common carrier freight rail operations. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. § 10901, even if the acquiring entity is a noncarrier, including a state. See Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). But when the carrier selling a rail line retains an exclusive, permanent easement to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligations, the Board (and its predecessor agency, the Interstate Commerce Commission) typically has found that authorization is not required, and that ownership of the line remains with the selling carrier for purposes of § 10901(a)(4). See Me. Dep't of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R. (State of Maine), 8 I.C.C. 2d 835, 836-37 (1991); Mich. Dep't of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry., FD 35606, slip op. at 3 (STB served May 8, 2012); Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 6 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011).

In its motion to dismiss, MassDOT states that it intends to acquire the physical assets at issue to facilitate (1) higher-speed intercity rail passenger service over the route, including rerouting the Vermonter passenger service provided by the National Railroad Passenger Corporation (Amtrak);<sup>2</sup> and (2) the possible future establishment of commuter or non-Amtrak intercity rail passenger operations over the route. MassDOT states that PAS would retain an exclusive, irrevocable, perpetual freight common carrier easement. MassDOT claims that it

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<sup>2</sup> According to MassDOT, the Vermonter currently is routed from Springfield east to Palmer, Mass., then north to Amherst, Mass., and Northfield, Mass., at which point it enters Vermont and New Hampshire (and trains traveling in the opposite direction use the same route in reverse). Amtrak plans to reroute the Vermonter over PAS's Connecticut River Main Line that MassDOT is seeking to acquire, which will allow the Vermonter to travel from Springfield to Northfield (and vice-versa) over a more direct route. Motion to Dismiss 7-8.

would not become a rail carrier subject to the regulatory authority of the Board because it would not acquire any rights or obligations that would interfere with the provision of freight common carrier service over the railroad assets. MassDOT therefore seeks a determination from the Board that its acquisition transaction does not require Board authorization under 49 U.S.C. § 10901.

Because PAS would continue to have sufficient access to the physical assets to conduct its freight operations, we are satisfied that this transaction would not impact PAS's ability to continue to fulfill its common carrier obligations. We are also satisfied that the 2014 Operating Agreement, as it pertains to the sale of assets, is consistent with the Board's State of Maine precedent. Therefore, no Board authorization is required for MassDOT's purchase of the PAS assets. The motion to dismiss will be granted with respect to the sale of the railroad assets.

The second issue involved in the transaction is whether our regulatory approval is required for MassDOT to acquire any passenger rights PAS might have over a segment of Amtrak-owned line between Springfield and the Massachusetts-Connecticut border. MassDOT explains in its motion that it is not clear that PAS possesses any such rights and that none of the parties have been able to confirm or disprove the existence of any such rights. MassDOT, however, requested that PAS transfer any rights to provide passenger service south of Springfield "out of an abundance of caution to extinguish" any rights that PAS might possess.<sup>3</sup>

MassDOT argues that no Board approval is required for the transfer of any passenger rights that PAS might possess for several reasons. First, it claims that this is a precautionary measure intended to avoid complications in connection with the possible future initiation of passenger rail service. MassDOT also argues that it could initiate commuter service without the need for advance Board approval. Finally, it claims that PAS could terminate any passenger rail status it may have without the need for advance Board approval, as it appears that the ICC Termination Act of 1995 does not require carriers to obtain authority to discontinue passenger rights.<sup>4</sup> MassDOT says it acknowledges, however, that the commencement of intercity passenger rail service that crosses state lines would require Board authorization.

Based on the transaction as described by MassDOT, it appears that the passenger operations would in fact fall within the Board's jurisdiction. Under 49 U.S.C. § 10501(a)(2)(A), the Board has jurisdiction over transportation by rail carrier between a place in a state and a place in the same state, as long as that intrastate transportation is carried out "as part of the interstate rail network." Cal. High-Speed Rail Auth.—Construction Exemption—in Merced, Madera & Fresno Cntys., Cal. (California High-Speed Rail), FD 35724, slip op. at 11 (STB served June 13, 2013). In California High-Speed Rail, the Board found that a 65-mile passenger rail line within the state of California was part of the interstate rail network due in large part to its "extensive interconnectivity with Amtrak." Id. at 12. It appears that whatever passenger rights MassDOT might acquire from PAS would be similarly interconnected with Amtrak and therefore part of the interstate rail network. MassDOT has not demonstrated that the passenger rights it might acquire from PAS allow only "mass transportation provided by a local

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<sup>3</sup> Motion to Dismiss 35.

<sup>4</sup> Id. at 35-36.

government authority,” see 49 U.S.C. § 10501(c)(2)(A), or otherwise fall within an exception from the Board’s jurisdiction, see, e.g., N.J. Ass’n of R.R. Passengers—Pet. for Declaratory Order—Princeton Branch (Princeton Dinky), FD 35745 (STB served July 25, 2014).

MassDOT cites State of Maine—Petition for Declaratory Order (State of Maine II), FD 35440 (STB served Dec. 29, 2010), in support of its argument that the passenger rights involved here do not require advance Board approval. In that case, MassDOT says, the Board determined that the acquisition of assignable passenger rail operating rights with no defined future passenger rail service plans did not trigger the need for Board authorization. Rather, the Board indicated that it would be incumbent upon the parties to determine whether Board authority is required as concrete plans materialized. State of Maine II, slip op. at 5.

The passenger rights in State of Maine II, however, differ significantly from those at issue in the instant case. In State of Maine II, the Board found that the evidence presented provided no basis for the Board to conclude that it had jurisdiction over the passenger rights that the Maine Department of Transportation was acquiring, specifically noting that “Maine DOT’s current passenger rail service plans do not contemplate, for example, the provision of service beyond state lines, either on its own or by through ticketing arrangements with another carrier.” Id. at 5. In this case, the segment of rail with possible passenger rights is *owned by* Amtrak, making the prospect of through ticketing arrangements likely. In addition, while the passenger rights terminate at the Massachusetts-Connecticut border, there is no station at that location. As such, it seems that any passenger rail service to be provided would necessarily cross into another state.<sup>5</sup>

Lastly, MassDOT has argued that its acquisition of any passenger rights from PAS is merely a precautionary measure intended to avoid complications with the possible future initiation of passenger rail service. But even if that is MassDOT’s motivation for acquiring the passenger rights, it does not change the fact that such a transaction still appears to require Board approval.

For these reasons, the motion to dismiss will be denied with respect to the transfer of passenger rights. Should MassDOT and PAS proceed with the transaction as it is currently structured, it appears that MassDOT would become a common carrier subject to the Board’s jurisdiction due to the acquisition of interstate passenger rights. If MassDOT does not wish to become a common carrier in light of the apparent acquisition of passenger rights, it may choose to excise the acquisition of those rights from the transaction. See, e.g., Wis. Dep’t of Transp.—Pet. for Declaratory Order—Rail Lines in Almena, Cameron, & Rice Lake, Barron Cnty., Wis., FD 35455 (STB served Nov. 10, 2011) (addressing whether Board authorization was required

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<sup>5</sup> Under 49 U.S.C. § 10501(c)(2)(A), the Board does not have jurisdiction over “mass transportation provided by a local governmental authority.” Commuter service can be outside the Board’s jurisdiction even if the commuter service would cross state lines. In Princeton Dinky, slip op. at 5, the Board held that excepted mass transportation under § 10501(c)(2)(A) is not subject to the Board’s jurisdiction even if it operates between two or more states.

following restructuring of proposed transaction).<sup>6</sup> No further Board decision would be necessary provided that MassDOT complies with the requirements of this paragraph with respect to the passenger rights.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion to dismiss the notice filed by MassDOT is granted in part and denied in part, as described above.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

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<sup>6</sup> MassDOT states in its filing that “[i]n all likelihood, PAS possesses no such rights.” Motion to Dismiss 35. If so, MassDOT can presumably still complete this transaction without the transfer of passenger rights from PAS to MassDOT.